

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.930 OF 2004

Shri. Gajanan Udhav Kamble ..Appellants

V/s

Shri. Maruti Shripati Charwad ..Respondents

Mr. S. S. Kshirsagar for the Appellants.
Mr. S. J. Rairkar for the Respondents.

CORAM: A.S.OKA, J.
DATE : 05.05.2005.

P.C.:

1. Heard Advocates appearing for the parties. The appeal is by the original plaintiff. Suit was initially filed for injunction and later on plaint was amended by incorporating prayer for possession.

2. Shri. Kshirsagar appearing for the Appellant submitted that so far as execution of sale deeds by the respondent and his father is concerned, the finding of the Trial Court was in favour of the appellant. He submitted that the respondent did not file the cross-objection in the appeal preferred by the Appellant to the District Court and, therefore, finding of the Trial Court regarding execution of the sale deeds could not have been disturbed by the Appellate Court. He placed reliance on the decision of learned single Judge reported in 2004(4) Maharashtra Law Journal 553 (Dadarao Tukaram Kosare and Ors., v/s. Shyam Co-op., Housing Society Ltd.). He submitted that there was no dispute

about the execution of the sale deeds and only plea of the Respondent was that the sale deeds are obtained by fraud. Learned Counsel submitted that the Appellate Court committed an error by holding that the execution of sale deeds is not proved. He relied upon evidence of a clerk working in the office of Sub-Registrar.

3. I have considered the averments made in the written statement. The Respondent has specifically denied execution of sale deed allegedly executed by him as well as sale deed allegedly executed by his father. As there was a clear denial of execution, it was for the original plaintiff to prove the execution by examining the independent witnesses. The evidence of the employee from the office of the Sub-Registrar cannot prove the execution as it is not the case that he was a witness to the transaction and that he knows the parties personally. As execution of sale deeds was disputed by the Respondent and the same was not proved by the Appellant, the Appellate Court has recorded the finding that the execution of sale deeds is not proved. I find no error in the approach of the Appellate Court.

4. The suit filed by the Appellant was dismissed by the Trial Court. While dismissing the suit issue regarding the execution of the sale deeds was decided in favour of the Appellant-plaintiff. Under Rule 22 of Order 41 of the Code of Civil Procedure, 1908 the Respondent-defendant was entitled to urge before the

First Appellate Court that even finding on the said issue relating to the execution of the sale deed ought to have been in his favour. Reliance placed on the decision of the learned Single Judge in the case of Dadarao Tukaram Kosare Vs. Shyam Co-op. Housing Society Ltd., (Supra) will not help the Appellant. In paragraph No.6 of the said decision the learned Judge has recorded the position of law on the basis of the concessions made by the Counsel appearing for the parties. I have taken a view while deciding Second Appeal No.394 of 1985 on 23rd February, 1985 that this said judgment of learned Single Judge does not lay down a proposition of law that after a suit is dismissed, in an appeal preferred by the original plaintiff, the defendant cannot challenge the adverse finding recorded against him on a particular issue without filing cross-objection.

5. As the Appellant failed to establish title which is based only on the sale deeds which are not duly proved, there is no merit in appeal. The Appellate Court was justified in holding that the Appellant has failed to prove the title. No substantial question of law arise.

6. Second Appeal is dismissed with no orders as to costs.

JUDGE